

Appeal No. 2009AP688

Cir. Ct. No. 2008CV1627

**WISCONSIN COURT OF APPEALS
DISTRICT II**

**SUSAN FOLEY-CICCANTELLI AND DR. MARK J.
CICCANTELLI,**

PLAINTIFFS-APPELLANTS,

FILED

V.

JAN 27, 2010

**BISHOP'S GROVE CONDOMINIUM ASSOCIATION, INC AND
STATE FARM FIRE & CASUALTY COMPANY,**

David R. Schanker
Clerk of Supreme Court

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, P.J., Anderson and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2007-08)¹ this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

ISSUE

This case involves the right of a party to be represented by counsel-of-choice in a civil lawsuit, the right of retained counsel to represent a party in a civil lawsuit, and the judicial right and authority to intervene. In other words:

Can a circuit court disqualify retained counsel-of-record in a civil suit, thereby denying the client the right to representation by chosen counsel and restricting the attorney's right to practice law in a civil action, where the attorney previously represented a nonparty witness for the opposing side?

BACKGROUND

Susan Foley-Ciccantelli and Mark Ciccantelli appeal from an order disqualifying their attorney from representing them in a personal injury suit. The Ciccantellis purchased a condominium from Bishop's Grove Condominium Association, Inc. in February 2007. Shortly thereafter, while walking near the garage, Susan slipped on a patch of ice and fractured her ankle. The Ciccantellis sued Bishop's Grove, alleging that the patch of ice formed due to negligent maintenance of a leaky gutter above the walkway. They alleged that Bishop's Grove had a duty to maintain the gutter pursuant to Bishop's Grove declaration documents. The Ciccantellis also sued State Farm Fire & Casualty Company, the liability insurer for Bishop's Grove.

The Ciccantellis identified Wayne Foster as the registered agent for Bishop's Grove. They alleged that Foster Group Ltd., as property manager for Bishop's Grove, notified State Farm of the incident. They referred to and attached a May 1, 2007 letter written by Foster to advise State Farm that Bishop's Grove

was responsible for maintenance of the driveway and the building exterior. The Ciccantellis then named Foster as a witness.

Bishop's Grove moved to disqualify the Ciccantellis' attorney, Timothy Andringa of Cramer, Multhauf & Hammes, LLP (Cramer). With its motion, Bishop's Grove included an affidavit by Foster who attested that, as the principal of Foster Group, he had been represented by the Cramer firm. Foster attested that, as Foster Group's counsel, Cramer had "drafted condominium documents and provided advice and counsel regarding all aspects of condominium development in prior years." Bishop's Grove also submitted a copy of the "Management Agreement" it had with Foster Group, which appointed the Foster Group as "exclusive managing agent of the [Bishop's Grove] condominium."

The Ciccantellis responded that Cramer's representation of the Foster Group was on matters unrelated to the current dispute with Bishop's Grove. They also asserted that Bishop's Grove was not a former client of Cramer and therefore had no standing to request disqualification.

The circuit court agreed with Bishop's Grove that Cramer should be disqualified. It stated that "even though the Foster group or Wayne Foster individually is not named as a party," Foster did have an "important role in the resolution" of the lawsuit and had taken the "unusual" step of interceding with the insurance adjuster to offer a legal opinion. The Ciccantellis petitioned for leave to appeal, which we granted.

DISCUSSION

The general rule regarding attorney disqualification states that "where an attorney represents a party in a matter in which the adverse party is that

attorney's former client, the attorney will be disqualified if the subject matter of the two representations are 'substantially related.'" *La Crosse County DSS v. Rose K.*, 196 Wis. 2d 171, 177, 537 N.W.2d 142 (Ct. App. 1995) (citation omitted). A circuit court's decision on attorney disqualification is reviewed for an erroneous exercise of discretion. *Id.* However, before a circuit court can reasonably exercise its discretion, it must determine whether the issue is properly raised by a party entitled to make the objection.

The novelty here is that the disqualification stems from the relationship between the Ciccantellis' law firm and that firm's past representation of Foster, a key witness and an agent of Bishop's Grove. In what appears on its face rather incongruous, Bishop's Grove invokes SCR 20:1.9(a) (2010), called "Duties to former clients," even though Bishop's Grove is not a former client of Cramer. Bishop's Grove emphasizes that Foster is its agent and is the witness through whom the question of liability will likely be resolved. This certification asks whether disqualification of an attorney pursuant to SCR 20:1.9 is available to nonclients.

Two competing legal precepts apply. First, courts have recognized that litigants have a strong interest being represented by counsel of their choice. *See Berg v. Marine Trust Co.*, 141 Wis. 2d 878, 887, 416 N.W.2d 643 (Ct. App. 1987). Alternatively, SCR 20:1.9(a) demonstrates that there are limits to choice of counsel. It states in relevant part:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in ... a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

We have held that “[a]ttorneys are obligated to avoid even the appearance of impropriety.” *City of Whitewater v. Baker*, 99 Wis. 2d 449, 453, 299 N.W.2d 584 (Ct. App. 1980). No finding of unethical behavior is necessary, and the circuit court “need only find the attorney has undertaken representation of a client whose interests are adverse to those of the former client.” *Id.* at 453.

Early case law supports the proposition that only a former client has standing to complain of an attorney’s representation of an adversary.² First, in *Forecki v. Kohlberg*, 237 Wis. 67, 75, 295 N.W. 7 (1940), the court stated, “Only a party who sustains a relation of client to an attorney who undertakes to represent conflicting interests may be entitled to object to such representation.” *Forecki* involved a personal injury suit wherein co-plaintiffs were represented by one

² We are mindful of the statutory protection afforded attorney-client communication:

(2) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client’s representative and the client’s lawyer or the lawyer’s representative; or between the client’s lawyer and the lawyer’s representative; or by the client or the client’s lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

(3) WHO MAY CLAIM THE PRIVILEGE. The privilege may be claimed by the client, the client’s guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer’s authority to do so is presumed in the absence of evidence to the contrary.

WIS. STAT. § 905.03(2) and (3).

attorney, and the plaintiff driver was also represented by the insurance company's attorney on the defendants' counterclaim. *Id.* at 73-74. The defendants objected to the potential conflict posed by the plaintiffs' attorney's dual representation as well as the insurer's attorney's representation of only the driver, but the court held it was not their right to object. *Id.* at 75.

Forecki was cited with approval in *In re the Disciplinary Matter of Marine*, 82 Wis. 2d 602, 605, 264 N.W.2d 285 (1978), where the court stated that "only the client, and not third persons, has standing to complain of an attorney's representation while adversely interested." However, *Marine* never undertook to analyze or apply the rule it presented, rather it mentioned *Forecki* only briefly and, without any analysis, determined that it was "neither desirable nor necessary" to address the issue of conflict of interest further. *Marine*, 82 Wis. 2d at 606.

More recently, we held that "only an attorney's former client is entitled to object when that attorney represents interests adverse to him or her." *Gieseke v. DOT, Div. of Highways*, 145 Wis. 2d 206, 210, 426 N.W.2d 79 (Ct. App. 1988) ("The state asserts that it is the county's interests, and not its own, that it seeks to protect. However, the state cannot object on behalf of the county."). These cases indicate that only Foster can object to Cramer's representation of the Ciccantellis.

However, some cases suggest that a person other than the former client may raise the objection. In *Rose K.*, the attorney was serving as guardian ad litem in a CHIPS proceeding against a father who the attorney had previously prosecuted in a paternity suit. *Rose K.*, 196 Wis. 2d at 178. The attorney had ongoing authority to prosecute the father for unpaid child support on behalf of the state and, by contract, the County. *Id.* at 179-80. Rose objected to the attorney's

representation of her children. *Id.* at 178. We concluded that “in the instant case, the test for determining whether a conflict exists is whether the attorney has undertaken representation which is adverse to the interests of a present client *or the interests of a third party with whom the attorney has a substantial relationship.*” *Id.* (emphasis added).

Another twist on the topic occurred in *Burkes v. Hales*, 165 Wis. 2d 585, 478 N.W.2d 37 (Ct. App. 1991). There, Burkes moved to disqualify Hales’ attorney because the attorney had previously represented a law firm that had worked on Burkes’ case. *Id.* at 588. However, there had never been a “contractual attorney-client relationship between [the attorney] and Burkes.” *Id.* at 592. On appeal, we acknowledged that an attorney-client relationship can exist “either impliedly or by imputation.” *Id.* at 592. Hales’ attorney had represented a law firm in a dissolution proceeding that included Burkes’ file; therefore, we concluded, the law firm’s fiduciary duty to Burkes was imputed to Hales’ attorney and disqualification was required. *Id.* at 593-94.

None of these cases offer guidance on the precise question presented: Can disqualification of an attorney in a civil lawsuit be prompted by the attorney’s prior representation of a third-party witness, who is also an agent of the party moving for disqualification? In each of the cases mentioned above, the conflict of interest resulting in disqualification involved an attorney-client relationship with a party to the lawsuit. Furthermore, the objection was raised by a party to the lawsuit. In *Forecki*, it was Kohlberg who asserted that the attorney representing both Forecki and a co-plaintiff, whose interests were adverse on some issues, should be disqualified. *See Forecki*, 237 Wis. at 75. In *Rose K.*, Rose asserted that the attorney appointed as guardian ad litem for the children should be disqualified because the attorney had represented LaCrosse County and the state in

a paternity action and had authority to pursue child support collection efforts regarding the same children. *Rose K.*, 196 Wis. 2d at 178-79. In *Burkes*, Burkes objected when his law firm's dissolution attorney undertook representation of his adversary, Hales. *Burkes*, 165 Wis. 2d at 589-90.

The case law dealing with who may move for disqualification is scarce. The interests involved, however, are substantial. A litigant has a strong interest in being represented by his or her attorney of choice. *Berg*, 141 Wis. 2d at 887. A litigant also has a strong interest in court proceedings untainted by an unfair advantage to the adverse party. See *Burkes*, 165 Wis. 2d 600 (ethical codes preserve a "lay sense of justice"). These competing interests raise an important question both substantively and procedurally in the efficient administration of justice. Clarification of the proper use of disqualification will impact a litigant's right to counsel of choice, an attorney's ability to manage his or her law practice, and a court's authority to intervene. For these reasons, we respectfully certify the issue.

